Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, HOUSE OF LITHOGRAPHY, INC., ASSOCIATED LITHO AND LETTERING SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH, MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions involved	3
Statutes involved	3
Mayoral Executive Order involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
1. The Decision Below Conflicts With This Court's Decisions Delimiting The Basis Upon Which A Local Municipality May Exercise Its Police Power	9
2. The Decision Below Raises Important Questions Of Federal Law Which Have Not Been, But Should Be Settled, Concerning The Application Of This Court's Labor Law Pre-emption Doctrine To Municipal Enactments Which Exclude Non-union Business Establishments From Performing Municipally-financed Contracts Solely Because Of Their Status As Non-union Employers	12
3. The Decision By The Second Circuit Is In Conflict With Applicable Decisions Of This Court And Subverts Established Principles Underlying The Federal Labor Law Pre-emption Doctrine	13
Conclusion	16
Appendix	1a-36a

CITATIONS

Cases: Page

Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 15

Amalgamated Ass'n. of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Rel. Bd., 340 U.S. 383 (1951) 15

Auto Workers v. O'Brien, 339 U.S. 454 (1950) 14

Connell Const. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975) 15

Dandrige v. Williams, 397 U.S. 471 (1970) 11

Eisenstadt v. Baird, 405 U.S. 438 (1972) 10

Hill v. Florida, 325 U.S. 538 (1945) 14

Machinists and Aerospace Workers v. WERC, 427 U.S. 132 (1976) . 15

Nash v. Florida Indus. Comm. 389 U.S. 235 (1967) 15

New Orleans v. Dukes, 427 U.S. 297 (1976) 11

New York Telephone Co., et al. v. New York State Department of Labor, et al., ____ F.2d ____, 96 LRRM2921, cert. granted U.S. Sup. Ct. No. 77-961 14

Reed v. Reed, 404 U.S. 71 (1971) 10

Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412 (1920) 10

San Diego Building Trades Council et al. v. Garmon, et al. 359 U.S. 236 (1959) 14, 15

Page

UNITED STATES CONSTITUTION CITED

Article VI, Clause 2 3

Fourteenth Amendment 3

STATUTES CITED

National Labor Relations Act 3

29 U.S.C. (Taft-Hartley Law): Sec. 157 ..... 5, 13

MUNICIPAL EXECUTIVE ORDERS

Executive Order of Mayor LaGuardia April 12, 1934 ..... 4, 32a-33a

MISCELLANEOUS

Cox, Labor Law Pre-emption Revisited, 85 Har. L. Rev. 1337 (1972) 14

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IMAGE CARRIER CORPORATION,
HOUSE OF LITHOGRAPHY, INC.,
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Petitioners,

v.

EDWARD I. KOCH,
MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 567 F.2d 1197 and appears in the Appendix hereto (2a-17a). It reversed the decision of the

United States District Court for the Southern District of New York (MacMahon, J.), reported at 430 F. Supp. 579 which held that the Respondents'[1] restrictive bidding and contracting practices, requiring that certain of Respondents' printing work be required to display the union label, were arbitrary and irrational, not reasonably related to any legitimate governmental purpose and therefore violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.[2]

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 30, 1977. A timely Petition for Rehearing with a suggestion for a hearing en banc was denied by the Second Circuit on February 16, 1978, and this Petition for Certiorari was filed within ninety days of that date.[3] This Court's jurisdiction is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a municipality may arbitrarily preclude non-union printers from bidding on and being awarded city printing contracts financed by taxpayer monies solely because of their status as non-union printers?

2. Whether Congress, in establishing a national labor policy protecting an employee's right to accept or reject

[1] This action was originally brought against Abraham D. Beame in his capacity as Mayor of the City of New York, City administrative agencies and various individual members of these agencies. See pages 34a-36a herein for a complete list of original Respondents and those individuals currently holding positions held by the original individual Respondents.

[2] See pages 18a-30a for the opinion on the District Court.

[3] See page 1a herein for Order of Second Circuit denying Petitioners' Petition for Rehearing.

union representation, intended that a municipality be permitted to promulgate a policy, the effect of which is to force employees to affiliate with a labor organization in order for their employer to be awarded certain municipally funded contracts?

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause, 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The pertinent federal labor policy is embodied in the National Labor Relations Act, *as amended* (hereinafter "NLRA",) 29 U.S.C. §§141 et seq. and is described at pages 12-15, *infra*.

MAYORAL EXECUTIVE ORDER INVOLVED

In relevant part, Mayor LaGuardia's 1934 Executive Order provides:[4]

> Resolved, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record;

To this end, the Order goes on to state:

> 1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.
>
> 2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment. . .

STATEMENT OF THE CASE

A. The Proceedings Below

This action was commenced on July 24, 1974, in the United States District Court for the Southern District of New York. Invoking the jurisdiction of the court pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), the Petitioners sought declaratory and injunctive relief pursuant to 28 U.S.C. 2201 against Respon-

[4] The full text of the Executive Order appears at pages 32a-33a herein.

dents' practice of restricting bidding upon, and awarding printing contracts to, only those printing establishments whose employees were represented by labor organizations and entitled to exhibit the union label.

As grounds for such relief, the Petitioners alleged that the restrictive practices deprived them of opportunities to bid upon and be awarded City financed contracts in violation of rights guaranteed them by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Further, the Petitioners alleged that the Respondents' restrictive bidding and contract awarding practices infringed upon the rights guaranteed employees under 29 U.S.C. §157, i.e. the right to reject labor union representation.

A non-jury trial was held on December 6, 1976 before Judge MacMahon. In his decision filed April 8, 1977, Judge MacMahon found that the Respondents' policy and practice of bidding upon and awarding printing contracts only to those printers whose employees are represented by labor unions and who exhibit a union label, violated the equal protection clause of the Fourteenth Amendment. On April 20, 1977, Judge MacMahon filed an order and judgment in which he stayed enforcement of his order pending Respondents' appeal to the United States Court of Appeals for the Second Circuit.

Timely notices of appeal to the Second Circuit were filed by the Respondents and on December 30, 1977, a panel of the Second Circuit (in a split decision per Judge Oakes), reversed the lower court decision of Judge MacMahon on the merits. Circuit Judge Anderson filed a concurring and dissenting opinion in which he contended that the decision of the District Court should be upheld.

Petitioners' timely motion for rehearing with a suggestion for a rehearing en banc was denied February 16, 1978.

B. The Facts

On April 12, 1934, the City of New York, pursuant to Executive Order of Mayor LaGuardia, adopted a policy restricting the awarding of all city printing contracts, except for the printing of letterhead and envelopes, to those private printing establishments whose employees were represented by a labor organization and etitled to display the union label.

Pursuant to this Mayoral Order, printing contracts awarded by the City subsequent to the effective date of the Order (April 20, 1934), have been restricted exclusively to printing establishments which are authorized to display the union label on their printed material. Implementing this 44-year-old procurement policy, the Respondent city agencies have included in their bid solicitations the specific requirement that work must be performed in a unionized facility and that such work, with the exception of letterheads, and envelopes, must bear the union label.

The ramifications of Respondent's restrictive bidding and contracting policy was clearly described in the court below. In a city where the increasing majority of printing establishments are non-union (350 non-union establishments, 250 union establishments), the policy contained in the 1934 Mayoral Order has had the effect of, ipso facto, foreclosing all non-union printing establishments from bidding upon and being awarded most city printing contracts. This exclusionary policy disqualifies all non-union printing companies from performing city work, notwithstanding the fact that the majority of those non-union companies, including the three named Petitioners herein, are fully qualified to perform the types of printing for which the city normally contracts. In fact, each of the Petitioners have

performed work similar to that required by New York City for both private and public sector clients.[5]

The District Court below held that Respondents' restrictive bidding and contracting practices were arbitrary and irrational and not reasonably related to any legitimate governmental purpose. In so holding, the court rejected Respondents' assertions that the restrictive bidding policy served to effectuate New York law requiring the payment of prevailing wage rates to workers under public contract; to further the City's interests in obtaining work of good quality; and to facilitate the policy of enforcing printers claims for overtime wages. Accordingly, the court concluded that the Respondents' policy of restricting the bidding upon and awarding of printing contracts to those printing establishments whose employees are represented by labor organizations and who may exhibit the union label, violated the equal protection clause of the Fourteenth Amendment.

In its decision per Judge Oakes, the Majority of the Panel of the Second Circuit reversed the District Court's decision, holding that the Respondents' restrictive bidding and contracting practices rationally promoted the City's interest in

[5] As a general rule, the type of printing work awarded by the Respondent agencies is uncomplicated. The testimony of Mr. Ed. Blank, Director of Printing Management of Printing Industries of Metropolitan New York (a trade association composed of both union and non-union printers), disclosed that most of the printing work awarded is generally one sheet work or booklets that can be done on the simplest and smallest type of printing equipment. According to Mr. Blank, the fact that one employer is unionized and another is not, had no bearing on the type or quality of work likely to be performed. Mr. Blank further observed that in order to assure high levels of quality and employee productivity, both union and non-union printers must have good management, up-to-date technology and well-trained employees, and that the question of union or non-union status played no part in the achievement of these goals.

fostering and promoting collective bargaining. Having discovered what it deemed a legitimate state interest behind the City's policies, the Panel concluded that, although the Mayoral Order may now be outdated, any re-evaluation of the Order should be achieved through legislative rather than judicial action.

Circuit Judge Anderson filed a strongly-worded concurring and dissenting opinion in which he concluded that the Panel Majority erred in reversing the judgment of the lower court on the merits. As viewed by Judge Anderson, the Majority's acceptance of the "foster collective bargaining" justification (an argument first raised by the Respondents during oral argument) was totally inappropriate since at no time, either before or during the District Court proceeding, did the Respondents advance such a justification. Further, Judge Anderson argued that the record below contained no evidence which would support a conclusion that the challenged restrictive bidding and contracting practices do, in fact, foster collective bargaining. As such, Judge Anderson concluded that, in the absence of proof supporting this conclusion, the Majority's adoption of Respondents' eleventh hour justification for their restrictive bidding and contracting policies was totally unwarranted.

THE REASONS FOR GRANTING A WRIT

The significance of this case not only to non-union printing companies and their employees, but to all non-union private sector employers and their employees cannot be too strongly stated.

The sole question herein presented is the legality of a municipal contracting policy which openly and admittedly discriminates against non-union printing establishments. This policy deprives non-union printing employers and their employees of the opportunity to bid upon and perform

private printing contracts financed by New York City taxpayers solely because of their non-union status—thus penalizing those employees who have mutually agreed to conduct their employment relationship in a non-union environment. This exclusion of open shop printing companies from eligibility to bid upon and be awarded public contracts, financed through public funds and issued by a tax-supported governmental body, raises basic and fundamental questions which require the attention of this court.

The Second Circuit's decision, upholding the constitutionality of the 1934 Mayoral Order and the contracting practices initiated pursuant thereto, calls into question the continuing viability of the numerous decisions of this Court which hold that governmental police power measures which are arbitrary and irrational and not reasonably related to any legitimate governmental purpose are to be struck down as repugnant to the Fourteenth Amendment of the United States Constitution. Moreover, the decision below is in direct conflict with this Court's decisions defining the scope and force of the labor law preemption doctrine and, as such, raises similar questions to those raised in the Second Circuit's decision in *New York Telephone Company, et al. v. New York State Department of Labor, et al.*, ____ F.2d ____, 96 LRRM 2921, which was recently granted review by this Court, U.S. Sup. Ct. No. 77-961.

1. The Decision Below Conflicts With This Court's Decisions Delimiting The Basis Upon Which a Local Municipality May Exercise Its Police Power.

In its decision below, the District Court found that Respondents' policy of rejecting bids on public printing contracts solely on the basis of the non-union status of the bidder was patently arbitrary and irrational and, consequently, in violation of Petitioners' rights as guaranteed by the Four-

teenth Amendment. In holding Respondents' restrictive contracting policies unconstitutional, Judge MacMahon placed his reasoning squarely in line with the body of law which holds that where a local government exercises its police power in such a way as to construct classifications of persons, such classifications must be reasonable, not arbitrary, and have a fair and substantial relation to a legitimate government objective. *Royster Guano Company v. Virginia*, 253 U.S. 412; *Reed v. Reed*, 404 U.S. 71; *Eisenstadt v. Baird*, 405 U.S. 438.

In his decision below, Judge MacMahon correctly applied the rational basis test. Judge MacMahon had before him ample evidence upon which to justifiably conclude that Respondents' union label policy was violative of the equal protection clause. The record is replete with testimony which establishes the irrationality of Respondents' restrictive bidding policy. The record also clearly supports the finding that the Petitioners have the capabilities to perform, and do, in fact, perform the type of printing jobs which the City presently restricts to only unionized printers.

At the trial, the Respondents were given every opportunity to show how the challenged restrictive bidding and contracting practices in any way furthered a legitimate state interest. Such a showing was not and could not be made. Since Respondents failed in their efforts to show how the restrictive bidding and contracting practices furthered some identifiable state purpose, the District Court was correct in finding such practices to be violative of the Fourteenth Amendment.

In reversing the District Court's decision on the merits, the Second Circuit rejected findings which were totally supported by the record and substituted a finding that the purpose of the Mayoral Order was "to foster collective bargaining." Such an imputation of purpose by the Second Circuit finds no support in the record.

In his concurring and dissenting opinion, Judge Anderson correctly identified the fallacy of the Majority's efforts to substitute purposes other than the explicit purpose set forth in the Order itself. In this regard, Judge Anderson stated:

> The preamble of the Executive Order of April 12, 1934, simply states: 'RESOLVED, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provision be made a part of each and every contract and open market order issued by the Board of City Record.' . . . No more expansive legislative history accompanies the resolution; no further explanations of its purposes were offered when subsequent administrations made executive decisions to continue the restrictive practice; and no mention of a desire to promote collective bargaining was ever made in connection with this 'union shop only' policy. (14a-15a)

When local economic regulations are challenged as violating the Equal Protection Clause, this Court has deferred to legislative determinations concerning the desirability of particular statutory distinctions, provided that the challenged classification is rationally related to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Dandrige v. Williams*, 397 U.S. 471 (1970). In this case, however, Respondents failed to show that the City's ban on the use of non-union labor in performing certain public printing contracts had any bearing upon the state's interest in collective bargaining, the payment of the prevailing wage rate or the City's interest in obtaining high quality workmanship. Indeed, even if there were Executive history to support the "foster collective

bargaining" rationale, such Executive intent, if interpreted to absolutely bar a non-union employer's participation in the competitive bidding process, would certainly run afoul of the Fourteenth Amendment.

Conflicting as this case does with numerous other decisions of this Court concerning a municipality's use of its police power, this case presents compelling issues which should be addressed by this court.

2. The Decision Below Raises Important Questions Of Federal Law Which Have Not Been, But Should Be Settled, Concerning The Application Of This Court's Labor Law Pre-emption Doctrine To Municipal Enactments Which Exclude Non-Union Business Establishments From Performing Municipaily-Financed Contracts Soley Because Of Their Status As Non-Union Employers.

This case presents the opportunity for this court to address the specific issue of whether a municipality or a municipal agency may, through the exercise of its police power, infringe upon the federally protected right of an employer and his employees to establish or refrain from establishing a collective bargaining relationship. In the instant case, the City of New York has intruded on the exercise of this right by depriving those employers and employees who maintain a non-union labor relationship from the opportunity to bid upon and receive printing contracts sponsored by New York City. The right of a municipality to penalize employers and employees who have exercised this federally protected right to maintain a non-union relationship has not been previously presented to this Court.

The facts in this case clearly establish that the direct result of Respondents' restrictive contracting policies is to require an employer and his employees to adopt a collective bargaining relationship if they wish to perform Respondents' printing. Failure to adopt such a relationship bars

both the employer and his employees from the opportunity to furnish such work to the City. Furthermore, Respondents' restrictive contracting practices provide a substantial impediment to unionized employees in the exercise of their federally protected right to decertify a labor organization as their bargaining representative. Obviously, employee awareness that a decertification of their union would mean loss of City printing work and lost earnings opportunity provides a significant deterrent to the commencement of any decertification effort — a right fully protected by the National Labor Relations Act.

3. The Decision by the Second Circuit Is In Conflict with Applicable Decisions of This Court And Subverts the Established Principles Underlying The Federal Labor Law Pre-emption Doctrine.

In its opinion, the Court below dismissed the Petitioners' allegation that Respondent's restrictive contracting practices arising out of the 1934 Mayoral Order are pre-empted by Section 7 of the National Labor Relations Act. In this regard, the Court below states:

> We do not believe that Section 7 of the NLRA pre-empts and thereby invalidates the City's resolution under the supremacy clause of the Constitution. Section 7 gives employees the right not to join a union under certain circumstances. Neither the City's resolution nor its policy memoranda in bidding instructions implementing the resolution requires any employee to join a union. Rather, the City's policy merely prefers union shops to non-union shops in awarding flat form printing contract . . . (10a)

The only precedent cited by the court for reaching this conclusion is the Second Circuit's own decision in *New York Telephone Co. et al. v. New York State Department of*

Labor, et al., supra. Ironically, this case, which involves issues similar to those raised herein, was recently granted certiorari by this Court, U.S. Sup. Ct. No. 77-961.

It is respectfully submitted that the 1934 Mayoral Order (and Respondents' implementation thereof) interferes with the Federal regulatory scheme established by Congress. It is conceded by the Respondents that the award of most City printing contracts is restricted to only those companies who are authorized to affix the union label. Therefore, Petitioners and their employees are forced to submit to unionization, to the deprivation of their employees federally protected Section 7 rights, if they desire to obtain the economic benefits of being able to perform City printing contracts. Under the Second Circuit's ruling, the only way that non-union printers may perform City printing work is by becoming a unionized employer. However, Federal law prohibits an employer from unilaterally taking such action unless a majority of its employees elect to be represented by a labor organization.

The pre-emption doctrine, as enunciated by this Court, is designed to avoid competing regulations of labor relations matters by state and local governmental bodies which undermine the policies embodied in federal labor laws. Indeed, in order to promote a "comprehensive national labor law", this court has consistently declared invalid any state regulatory scheme found to impair rights created by the National Labor Relations Act. See *Hill v. Florida*, 325 U.S. 538 (1945); *Auto Workers v. O'Brien*, 339 U.S. 454; cf. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). See also, *Cox, Labor Law Pre-emptions Revisited*, 85 Har. L. Rev. 1337 (1972).

With the adoption of the National Labor Relations Act, Congress regulated and occupied the substantive area of labor relations "to the full extent of its constitutional power under the Commerce clause". *Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Rel. Bd.*, 340 U.S. 383, 391 (1951). As such, the Federal labor policy set forth in the National Labor Relations Act pre-empts and voids any governmental actions which have a tendency to frustrate the operation of the Federal scheme; *Nash v. Florida Indus. Commn.*, 389 U.S. 235 (1967) or which create a substantial risk of conflict with policies central to the Federal Labor Law. *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). In the instant case, New York City's action clearly frustrates the exercise of federally guaranteed employee rights and directly conflicts with federal labor law policy protecting the right of employers and employees to establish and maintain a non-union employment relationship.

Exceptions to the pre-emption doctrine have been countenanced in only the most limited of circumstances.[6] Since none of these circumstances have any application to the instant case, the Respondents' restrictive practices should be found to be pre-empted.

---

[6] Where the activity regulated by the State was merely a peripheral concern of the Federal labor law (*San Diego Bldg. Trades Council v. Garmon, supra; Lodge 76, IAM v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); where such local governmental activity touch interests so deeply rooted in local feeling and responsibility that . . . (a court) cannot infer that Congress had deprived the states of the power to act (id.); where Congress has affirmatively indicated that the States have the power to act (*Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971)).

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Dated: May 15, 1978
Washington, D.C.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, and for the Second Circuit, held at the United States Court House in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-eight.

. x

Image Carrier Corporation,
Plaintiff-Appellee,

v.

Abraham D. Beame, Mayor of New York City, et al.,
Defendants-Appellants.

. 77-7205

House of Lithography, Inc., et al.,
Plaintiffs-Appellees,

v.

Abraham D. Beame, Mayor of New York City, et al.,
Defendants-Appellants

. x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

[Filed Feb. 16, 1978]

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 79, 80, 82—September Term, 1977.

(Argued September 20, 1977 Decided December 30, 1977.)

Docket Nos. 77-7205, -7206, -7224

IMAGE CARRIER CORPORATION,

Appellee.

v.

ABRAHAM D. BEAME, Mayor of New York City, et al.,

Appellants.

THE HOUSE OF LITHOGRAPHY, INC., et al.,

Appellees,

v.

ABRAHAM D. BEAME, Mayor of New York City, et al.,

Appellants.

Before:

SMITH, ANDERSON and OAKES,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, holding unconstitutional New York City union and union-label bidding requirements for flat-form printers, as a denial of equal protection to nonunion

printers. The district court's conclusions on abstention, standing, ripeness and federal preemption are upheld.

The judgment on the merits is reversed.

CAROLYN E. DEMAREST, Assistant Corporation Counsel, City of New York (Bernard Richland, Corporation Counsel, City of New York), *for Appellant New York.*

FRANCIS T. COLEMAN, Washington, D.C. (Donald L. Rosenthal, Washington, D.C., Townley & Updike, New York, N.Y., of counsel), *for Appellee.*

NORMAN ROTHFELD, New York, N.Y., *for Intervenor-Appellant.*

OAKES, *Circuit Judge:*

This appeal raises the specter of *Lochner* v. *New York*, 198 U.S. 45 (1905), which, with the possible exception of *Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857) (the Dred Scott case), remains the most discredited of Supreme Court decisions. We reject the attempt to resurrect this apparition of the past.

At issue below,[1] as well as on this appeal, is a policy of the City of New York (City) whereby only printers employing union labor and exhibiting the union label are permitted to bid for the City's "flat-form printing" business.[2]

1 The federal claims were presented pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3). Declaratory relief was sought under 28 U.S.C. § 2201, as was injunctive relief.

2 "Flatbed printing," another term for flat-form printing, utilizes "a printing press in which a flat bed holding the printing form moves against a revolving cylinder which carries the paper." The Random House Dictionary of the English Language (1966).

Utilizing traditional equal protection analysis, thereby avoiding the substantive due process issue raised by appellees, the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, found the City's practice "irrational" and hence unconstitutional.[3] We reverse the district judge's equal protection holding and find no violation of appellees' due process rights. However, we agree with the district judge that this case is not appropriate for abstention, that appellees have standing to raise their constitutional claims and that Section 7 of the National Labor Relations Act (NLRA)[4] does not preempt the City's practice of favoring union printers.

I

Facts

Appellees, plaintiffs in the district court, are non-union printers. Appellants, defendants below, are City officials who enforce the practice of restrictive bidding on flat-form printing contracts. The Allied Printing Trades Council of Greater New York, an umbrella organization of printing unions, has participated in these proceedings as intervenor.

The controversy arises over a Resolution (Resolution) adopted April 12, 1934, by the New York Board of City

3 The opinion below is reported at 430 F. Supp. 579 (S.D.N.Y. 1977).

4 Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Record[5] requiring bidders for flat-form work to operate a union plant and to pay the "prevailing rate of wages."[6] In addition, the forms printed for the City must bear the union label. These requirements are followed by the Department of Purchase,[7] the Board of Education[8] and the

5 The Resolution, signed by Mayor LaGuardia and the then City Comptroller and Corporation Counsel, provides in pertinent part:

> 1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.
>
> 2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment.

6 This rate is determined in accordance with state law. N.Y. Labor Law § 220(5)(a) (McKinney Supp. 1976) states:

> The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality as hereinafter defined to the majority of workmen, laborers or mechanics in the same trade or occupation at the time the work is performed. In the event that it be determined that there is not a majority in the same trade or occupation paid at the same rate, then the rate paid to the greater number in such trade or occupation shall be the prevailing rate, provided such greater number constitutes at least forty per centum of the laborers, workmen or mechanics engaged in such trade or occupation; in the event there is less than forty per centum of the laborers, workmen or mechanics engaged in the same trade or occupation in the same locality paid the same rate, then the average paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. Laborers, workmen or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

7 The Department's Supplement to Standard Instructions to Bidders states:

> Unless otherwise specified in the schedule, all work must be done in a union printing plant located within the City of New York. The union label must appear on all printing except letterheads, noteheads and any other printing excepted in the schedule.

8 The Board's Bid Invitation for Jobs of $5,000 or Less includes the language:

> Unless otherwise specified, all printing required by this contract except envelopes, must be done in a printing plant located within

Health and Hospitals Corporation.[8] We need not question the district court's factual findings that printing quality is not a function of union status[10] and that the 350 nonunion shops in New York, as compared to the 250 union shops, come closer to paying the required prevailing wage rate,[11] because we believe that a rational basis for the City's policy exists.

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the City of New York. The union label must appear on all of the forms, required under this contract, except letterheads, noteheads and envelopes.

9 A December 3, 1971, memorandum of the Health and Hospitals Corporation provides:

> [T]he Health and Hospitals Corporation will follow the procedure established by the New York City Department of Purchase in which letterpress or offset printing and all accessory operations as required will be done in a union printing plant located within the City of New York. The union label must appear on all printing except letterheads and noteheads.
>
> This policy applies to the hospitals as well as Central Office procurement.

10 430 F. Supp. at 584.

11 The district judge found:

> Even assuming that the purpose was to ensure that the prevailing wage rate is paid the evidence here refutes defendants' contention that the challenged classification rationally furthers that purpose. We will assume, *arguendo*, that Section 220 of the New York State Labor Law sets the prevailing wage rate, as defendants contend. That statute defines "the prevailing rate of wages" as that rate paid to the majority of workmen, laborers or mechanics in the same trade. It does not mention labor unions.
>
> The only testimony before us concerning the employment status of the "majority of workmen, laborers or mechanics" in the printing trade is that there are 350 non-union, as compared to 250 union, shops in a trade association known as Printing Industries of Metropolitan New York. This evidence indicates that the prevailing wage rate, as defined by the statute on which defendants rely, follows the non-union rate more closely than the union rate and, therefore, undermines defendants' contention that the union label requirement safeguards payment of the prevailing wage rate.
>
> Moreover, plaintiffs' expert testified that there is no correlation between the union or non-union status of a printing company and the wage rates it pays to its employees; some non-union rates are as high or higher than some union rates. He further testified that union rates vary considerably.
>
> Union rates, therefore, do not necessarily meet the prevailing wage rate. More fundamentally, there is no evidence here of any natural, logical or necessary correlation between the union wage rate and the prevailing wage rate. Nor is there any evidence showing any reason why non-union rates might not approximate the prevailing wage rate as closely as union rates. The presumption of validity must yield to the evidence which showed that there was no logical or even statistical correlation between the prevailing wage rate and the union or non-union status of the printing company.

Id. at 584-85 (footnotes omitted).

II

Discussion

A. *Abstention*

1. "Pullman" Abstention.

Judge MacMahon was correct in not exercising his discretionary authority under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500-01 (1941), to abstain when state law is uncertain and a state court construction might obviate the need for federal constitutional adjudication. This case, as in *McRedmond* v. *Wilson*, 533 F.2d 757, 759 (2d Cir. 1976), "does not present the narrowly limited circumstances permitting invocation of the doctrine . . . ." A decision on the constitutional claims does not depend on an interpretation of unclear or complex state law. *See id.* at 760, 762. There is no ostensible basis for interpreting the Resolution, or the bidding requirements implementing it, to permit nonunion shops to do flat-form printing for the City. Even if nonunion shops pay the prevailing wage rate, *see* note 6 *supra*, they are nevertheless precluded from bidding because the Resolution is drafted in the conjunctive: the printer must be "a union plant *and* pay the prevailing rate of wages." (Emphasis added.) The union-status requirement is clear and without ambiguity. *Cf. Lake Carriers' Association* v. *MacMul-*

lan, 406 U.S. 498, 511 (1972) (abstention appropriate where statute is unclear "in particulars that go to the foundation of . . . grievance").

2. "Younger" abstention.

Allied's request for federal court abstention based on *Younger* v. *Harris*, 401 U.S. 37 (1971), and subsequent cases amplifying *Younger*, *e.g.*, *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), is totally misplaced. There is no ongoing, *see, e.g.*, *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), or even contemplated, *see Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 929 (1975), state proceeding with which the federal action interferes. While appellees claim that the Resolution is invalid under state law,[12] this is a wholly inadequate basis for invoking federal court abstention.

B. *Justiciability*

1. Standing.

As prospective bidders for City business, appellees clearly have economic interests at stake sufficient to give them standing.[13] Their injury in fact is loss of business which, even though indirect, is "fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). Since the trial court found that some nonunion shops were perfectly capable of doing the City's

12 Neither our decision nor that of the district court addresses these claims.

13 Appellees have standing even under the most restrictive of recent Supreme Court standing cases, *see, e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975), and of recent standing cases in this court, *see, e.g.*, *City of Hartford* v. *Town of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (en banc), *petition for cert. filed*, 46 U.S.L.W. 3323 (U.S. Nov. 15, 1977) (No. 77-639).

work, 430 F. Supp. at 584, 585, appellees' injury is a type "likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

2. Ripeness.

We read Allied's standing argument as implicitly questioning the ripeness of appellees' claims. Essentially, Allied suggests that appellees should have bid for City work and been turned down in order to present a justiciable claim. However, it would have been futile to do so since it is obvious that they could not have been awarded a contract.

In *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court *sub silentio* found a ripe controversy in circumstances virtually identical to those present in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). The reason for the different outcomes on the ripeness issue in *Letter Carriers* and in *Mitchell* must have been the passage of time and the ensuing accumulation of experience, interpretation and administration of the Hatch Act. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 32 (2d ed. Supp. 1977). The record indicates that a number of policy memoranda and contract forms have been developed to implement the union label rule, *see* notes 7-9 *supra*, which was first promulgated in 1934. After 43 years of following its pro-union policy the City's position is amply developed. Requiring a nonunion shop to undergo the expense of preparing a bid with the certainty that it will be rejected imposes unnecessary financial hardship, *see Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153 (1967), without framing the issues more sharply.

C. *Preemption.*

We do not believe that Section 7 of the NLRA, note 4 *supra*, preempts and thereby invalidates the City's Resolution under the Supremacy Clause of the Constitution. Section 7 gives employees the right not to join a union under certain circumstances. Neither the City's Resolution nor its policy memoranda and bidding instructions implementing the Resolution requires any employee to join a union. Rather, the City's policy merely prefers union *shops* to nonunion *shops* in warding flat-form printing contracts. Moreover, nothing in the sparsely developed record indicates that the City's flat-form printing needs, as distinguished from either the City's overall printing needs or the total printing work available in and around New York City, are substantial enough to have even an indirect coercive effect on nonunion employees to abandon their Section 7 right not to join a union. Indeed, the only relevant statistic in the entire record belies such an effect: the obvious logical inference to be drawn from the presence of 350 nonunion shops and 250 union shops in the printing business in New York City is that printing employees have not in substantial number relinquished their Section 7 rights.[14] Because appellees have nowhere indicated how the City's practice in any way alters the collective bargaining relationship within nonunion shops. there is no need to determine whether Congress intended that federal labor law preempt those local practices which do alter collective bargaining relationships. *Cf. New York Telephone Co.* v. *New York State Department of Labor*, No. 77-7337, slip op. at 6385 (2d Cir. Nov. 9, 1977) (even where state unemployment compensation benefits paid to striking employees may affect union's ability to maintain

14 The record does not indicate whether the total number of nonunion employees is greater than the total number of union employees.

a strike, Congress intended to allow states to legislate in this area).

D. *The Merits*

Just as the Due Process clause of the Fourteenth Amendment did not "enact Mr. Herbert Spencer's Social Statics," [15] the Equal Protection Clause of the same amendment[16] did not enact Professor Milton Friedman's economics of the marketplace.[17] Since the days of the Depression the declared policy of the nation has been to foster collective bargaining, NLRA § 1, 29 U.S.C. § 151. Similarly, the avowed policy of the State of New York, embodied in its State Labor Relations Act, is to promote collective bargaining:

> It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. . . .
>
> . . . .
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife

15 *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, *J.*, dissenting).

16 Justice Holmes's famous statement in *Lochner* referred to the Fourteenth Amendment as a whole although the decision rested on the Due Process clause. The Equal Protection clause, until Mr. Justice Jackson's prescient concurrence in *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 111 (1949), had been relegated to the status of the "last resort of constitutional arguments." *Buck* v. *Bell*, 274 U.S. 200, 208 (1927) (Holmes, *J.*).

17 *E.g.*, M. Friedman. *There's No Such Thing as a Free Lunch* (1975).

> and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.[18]

In the depths of the Depression in 1934, when the Resolution was promulgated (although before the State Labor Relations Act was itself adopted), it was entirely rational for the City fathers to believe that it was "in the public interest that equality of bargaining power be established and maintained" and that their pro-union Resolution would restore "equality of bargaining power" to printing employees, remove "certain recognized sources of individual strife and unrest," raise "the purchasing power of wage earners," reduce unemployment, and lessen the effects of "recurrent business depressions." N.Y. Labor Law § 700 (McKinney 1977). At least, that is what we read into the preamble to the Resolution insofar as it refers to lending "the greatest measure of and assistance during the present economic depression" to those citizens engaged in the printing industry.[19] To be sure, times have changed. Perhaps, as a matter of policy, favoring unionized employers should

18 N.Y. Labor Law § 700 (McKinney 1977).

19 Intervenor's answer, ¶ 13, refers in addition to "special values" from union labels and "assurances of craftsmanship," to the Resolution's promoting "assurance of satisfactory working conditions collectively bargained on behalf of the employees, assurance of freedom from labor disputes for the durations of said collective bargaining agreements, effectuation of the public policy of the State of New York and other benefits to the defendants . . . ." We believe the court can and should take judicial notice of the policies underlying the federal and state labor relations acts, that the Intervenor advanced these policies as justification for the Resolution by its answer below, and that a city might *rationally* think those policies promoted by the specifications here in issue.

be reexamined by the responsible authorities, now that both the quality of printing and the wages paid may be roughly equivalent. *See* 430 F. Supp. at 584-85. But reevaluating the wisdom of the Resolution is a legislative decision. And in economic matters, whether under the guise of substantive due process, *Ferguson* v. *Skrupa*, 372 U.S. 726, 729-32 (1963); *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955); *see* Comment, 50 N.Y.U.L. Rev. 1149, 1152 & n.16 (1975), or of equal protection, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 486-87 (1970); *Williamson* v. *Lee Optical, Inc.*, *supra*, 348 U.S. at 488-89, the courts have not, since the days of the Depression, interfered with legislative judgments rationally related to a legitimate governmental objective.

Judgment reversed.

ANDERSON, *Circuit Judge, concurring in part, dissenting in part:*

I concur in those portions of the majority opinion which uphold the district court's conclusions concerning abstention, standing, ripeness and federal preemption, but I dissent from the holding on the merits and the reversal of the judgment of the district court.

At the trial below, appellants asserted that the City's restrictive bidding policy served several purposes: (1) to effectuate New York law requiring the payment of the prevailing wage rate to workers under public contract, Labor Law §220(3); (2) to further the City's interest in obtaining work of good quality; and (3) to facilitate the policing of printers' claims for overtime wages. After carefully considering the evidence presented in support of these claims, the district court correctly rejected them.

At no time before or during the trial did appellants argue that the City's policy was designed to further the federal and state interest in fostering collective bargaining. See National Labor Relations Act §1, 29 U.S.C. §151; New York Labor Law §700. The appellants raised this contention for the first time on appeal, and it is wholly unsupported by any evidence in the record or any offer of proof. See *Sugarman* v. *Dougall*, 413 U.S. 634, 645 (1973). It was presented at oral argument as the principal justification for the policy. The majority accepts this rationale, and, relying on the language of Labor Law §700, concludes that the City's pro-union Resolution reflects a considered legislative judgment that such a policy will help to restore equality of bargaining power to printing employees and to lessen the effects of recurrent business depressions. In the absence of supporting proof for these conclusions, the majority's adoption of appellants' eleventh hour justification for the restrictive policy is unwarranted. Although legislative economic classifications are presumed to be constitutional, it is not evident that the pro-union Resolution in question here is rationally related to the state's legitimate interest in fostering collective bargaining. There has been no showing that the City's bidding regulation was intended to or does, in fact, promote this purpose. The preamble to the Executive Order of April 12, 1934, simply states: "Resolved that in order to lend the greatest measure of aid and assistance *during the present economic depression* to those citizens of our city engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record." (Emphasis added.) As stated in an affidavit submitted by appellants, the policy was enacted to alleviate the high rate of unemployment that confronted union employees in the printing industry in New York City in 1934. No more expansive

legislative history accompanied the Resolution; no further explanations of its purposes were offered when subsequent administrations made *executive* decisions to continue this restrictive practice; and no mention of a desire to promote collective bargaining was ever made in connection with this "union shop only" policy.

Appellants concede that the Resolution is no longer justified by a need to keep printing businesses in New York City or to provide jobs for union workers. See *Abie State Bank* v. *Bryan*, 282 U.S. 765 (1931). Instead, they argue that it has other beneficial effects for the City. They attempted to demonstrate its importance at the trial, but failed even to discuss its relationship to the goal of collective bargaining or the purposes of New York Labor Law §700.

The majority cannot rely upon this state statute, however, because it was not added to the New York Labor Relations Act until 1940—six years after the promulgation of the pro-union Resolution—and, therefore, an effort to further its purposes cannot be imputed to the signers of the Executive Order. Moreover, it is significant that while §700 is designed to promote collective bargaining, it makes no effort to preclude non-union shops from bidding on public works contracts. General Municipal Law §103 makes it clear that, except as otherwise expressly provided by a local law adopted prior to September 1, 1953, contracts for public work, including printing contracts, are to be awarded to the *lowest responsible bidder*. The "lowest responsible bidder" has been held to include non-union as well as union shops, see ***Apex Indust. Const. Corp.*** v. ***Village of Lake George***, 31 A.D.2d 670, 295 N.Y.S.2d 548 (1968); *Long Island Signal Corp.* v. *County of Nassau*, 51 Misc.2d 320, 273 N.Y.S.2d 188 (1966); and, therefore, agencies of New York *State* could not lawfully refuse to award

a contract to a successful bidder solely because it employed non-union workers.

When local economic regulations are challenged as violating the Equal Protection Clause, the court will defer to legislative determinations as to the desirability of particular statutory discriminations, provided that the classification challenged is rationally related to a legitimate state interest. *New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). In this case, appellants have failed, however, to show that the City's ban on the use of non-union labor in performing certain public printing contracts has any bearing upon the state's interest in collective bargaining or the payment of the prevailing wage rate or to the City's interest in the ability of the printing shops reliably to perform high quality work.[1] Cf. *Sugarman* v. *Dougall*, *supra*.

The City is a corporate body and, as such, it may enter into contracts and hold and dispose of property. When it does so, however, it acts as trustee for the people of the City, and it is in this trust capacity that, in the City's name, it enters into contracts and expends the people's money through a city government of the people's own creation. The city, therefore, has an obligation to conserve public funds. To this end, regulations were enacted to govern bidding on public contracts to ensure that such contracts are awarded to the lowest responsible bidder. These regulations are designed to benefit the public, not the bidders. See *General Bldg. Contractors* v. *Bd. of Trustees*, 42 A.D.2d 660, 345 N.Y.S.2d 195 (1973); *Allen* v. *Eberling*, 24 A.D.2d

1 Appellants would have this court take judicial notice that union printing shops would be more reliable in meeting contract deadlines than non-union shops because labor disruptions would be minimized. They have introduced no evidence to support this claim and the court should not take it upon itself to attribute irresponsibility in labor matters to the owners of non-union shops where there has been no proof of such conduct.

594, 262 N.Y.S.2d 121 (1965); *Marino* v. *Town of Ramapo*, 68 Misc.2d 44, 326 N.Y.S.2d 162 (1971). They should not be used to promote the interests of labor organizations by forcing printing shops to unionize in order to qualify for city contracts. Both union and non-union shops have a right to apply for public printing contracts on equal terms. The conditions which must be met to receive the award of such a contract must be reasonable and related to qualifications for the job to be performed. In this case, appellants' restrictive, "union shop only" policy fails to meet this test.[2]

Accordingly, I would affirm the judgment of the district court.

2 If, instead of having before it the present case, this court were to be presented with an attack by organized labor on the obverse of the city's present policy, i.e., a policy restricting bidding on city printing contracts to *non*-union shops only, there is little doubt that the court would hold that such a resolution was inconsistent with state law designed to protect the right of employees to freedom of association and organization, and that it was, therefore, invalid. New York Labor Law §712; see also, Municipal Home Rule Law §10; *Wholesale Laundry Bd. of Trade, Inc.* v. *City of New York*, 17 A.D.2d 327, 234 N.Y.S.2d 862, *aff'd*, 12 N.Y. 2d 998, 239 N.Y.S.2d 128 (1962); *City of Corning* v. *Corning Police Dept.*, 81 Misc.2d 294, 366 N.Y.S.2d 241, *aff'd without opinion*, 373 N.Y.S.2d 1022 (1975). State statutes which touch or concern labor relations, however, should be neutral. *Lodge 76, International Ass. of Machinists* v. *Wisconsin Emp. Rel. Commission*, 427 U.S. 132, 149-150 (1976); *New York Tel. Co.* v. *New York State Dept. of Labor*, —— F.2d —— (2d Cir. Nov. 9, 1977), slip op. at 6385; and although the New York State Labor Relations Act encourages collective bargaining, it does not mandate it; nor does it require that all labor performed for the state or its subdivisions must be consummated by organized labor and by no one else. By exerting economic pressure on unorganized employees to unionize, the city's pro-union Resolution interferes, just as significantly as would a "non-union only" policy, with associational freedoms protected by state law; and, therefore, should not be declared lawful. The impartial and even-handed administration of justice as well as the interests of the public call for a balanced and fair approach which makes neither the union employees nor the non-union employees an ineligible class of bidders.

APPENDIX C

DISTRICT COURT DECISION

Opinion of MacMahon, J.

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Opinion of MacMahon, J.

MACMAHON, *District Judge.*

Plaintiffs, non-union printers, allege that defendants' practice of restricting bidding upon, and of awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can therefore exhibit the union label deprives them of an opportunity to bid on these contracts, in violation of their rights under the due process and equal protection clauses of the Fourteenth Amendment, and is contrary to New York state law, the New York City Charter, and public policy. They seek a declaratory judgment and an injunction prohibiting that practice.

A non-jury trial was held before us on December 6, 1976 to determine these issues, and the following constitutes our findings of fact and conclusions of law.

Plaintiffs challenge the union label requirement on both federal constitutional and state law grounds, and since decision upon state grounds might avoid needless constitutional adjudication, we must consider, in light of the doctrine announced in *Railroad Comm'n of Texas* v. *Pullman Co.*,[1] whether abstention is appropriate.

Abstention is an equitable doctrine and has its origins in principles of federalism and comity.[2] It serves to avoid needless friction with, and demonstrates proper respect for, state law and state courts. It is not a rule of necessity,[3] and the decision to abstain is vested in the sound discretion of the district court.[4] The doctrine is applicable only in special circumstances[5] and only when the issue of state law is uncertain,[6] as it is here. We do not think, however, that abstension is warranted here because neither party has even raised, much less requested abstention, and the case, after considerable delay, has already been tried.[7] Furthermore, there is no vital state or city interest, nor elaborate regulatory program involved, and consequently

the interference with the city's administration of its own affairs resulting from a determination that the union label requirement is invalid would be minimal.[8] Finally, the constitutional question, whether the union label policy violates the Fourteenth Amendment, is of very narrow compass.[9]

Under these circumstances, we think that the injustice of subjecting plaintiffs to added expense and delay outweighs the advantages which may accrue from adherence to the traditional policy of avoiding constitutional adjudication by abstention.[10]

The question of whether the union label requirement violates state law or the New York City Charter is sufficiently unsettled,[11] especially as compared to federal constitutional precedent in this area,[12] to make a decision as to its validity on that basis inappropriate. We, therefore, proceed to consider the validity of the union label requirement under the due process and equal protection clauses.

There is no dispute that the Department of Purchase,[13] which awards all the printing contracts for New York City, the Board of Education[14] and the New York City Health and Hospital Corporation,[15] have adopted a policy requiring that all public printing work must be done in a union plant located in New York City and bear the union label, save for letterheads, noteheads or unless otherwise excepted. Defendants claim that this policy is justified because it rationally furthers legitimate municipal interests, even though it deprives plaintiffs of an equal opportunity to bid upon and to be awarded printing contracts.

We must determine, at the outset, whether the due process and equal protection guarantees of the Fourteenth Amendment are applicable to the award of public printing contracts in light of *Atkin* v. *Kansas*[16] and its progeny. The Supreme Court, in *Atkin*, upheld a Kansas statute which regulated the pay and limited the hours of employees

of the state, its subdivisions and public contractors. The Court stated that, since the work was of a public character, "it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others. . . ."[17]

Relying in part on *Atkin*, the court held, in *American Yearbook Co.* v. *Askew*,[18] that a Florida statute requiring all public printing to be done in the state was not violative of the equal protection clause because the award of such contracts was a proprietary, or a business, rather than a governmental function, and that, when a municipality or state acted in such capacity, it was exempt from the limitations of the equal protection clause.[19]

Since plaintiffs do not challenge the requirement here that public printing be done in a plant located in New York City, the specific holding in *American Yearbook* is inapplicable. Furthermore, that holding could be sustained on the principle that the equal protection clause is confined to persons within the jurisdiction of the state which enacted the challenged statute.[20] In any event, the Supreme Court has ruled that the due process[21] and equal protection[22] guarantees are applicable to public employment. While the coverage afforded by these two guarantees often overlaps, the appropriate analysis under each is different.[23]

The Supreme Court has rejected the right-privilege distinction employed in due process analysis by *Atkin*, as well as a number of earlier cases.[24] Therefore, it no longer suffices to say that, although a government may not deprive someone of a right arbitrarily, it may do so in the case of a privilege.[25] However, the plaintiff must still demonstrate the deprivation of some liberty or property interest protected by the Fourteenth Amendment in order to invoke the due process guarantee.[26]

Plaintiffs here have not addressed themselves to the issue of whether their opportunity to bid on public contracts is one of liberty or property within the meaning of the due process clause, but we need not decide this issue since we have determined that the union label requirement violates the equal protection clause.

The equal protection clause is a more explicit safeguard than the due process clause,[27] and its coverage is not confined to deprivations of liberty or property. Although the Supreme Court held that the equal protection clause was not violated in *Atkin*, it clearly indicated that the clause is applicable to public employment regulations[28] and, as recently as *Massachusetts Board of Retirement* v. *Murgia*,[29] has subjected such regulations to equal protection scrutiny even though they were promulgated by the state in its proprietary capacity as an employer.

We see no justification in the case law, the language of the Amendment, or in reason for restricting the reach of the equal protection clause. Indeed, such a course would be fraught with danger to the very principles underpinning the Amendment. We, therefore, turn to the question of whether the union/non-union classification here violates the equal protection clause.

Traditional equal protection analysis is a two-tiered system. Strict scrutiny of a classification is required only if the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvange of a suspect class.[30] If not, then the classification is examined under the relatively relaxed rational basis standard, which requires only that the classification rationally furthers a legitimate purpose identified by the state,[31] and, under that standard, the classification is presumed valid.[32] Since we find that the union label requirement does not satisfy the rational basis standard,[33] it is unnecessary to determine whether a strict scrutiny test should be applied.

Defendants contend that the union label requirement rationally furthers the city's interest in obtaining good quality work. The relevant equal protection inquiry, therefore, is directed to the quality of union, as opposed to non-union, printing.

Plaintiffs' expert testified that the quality of work does not depend on the union or non-union status of the printing establishment and that, in general, the work required by the city did not require a high level of skill. Moreover, three non-union printers testified that they could perform the work required by the city with the requisite degree of skill and competence. The roster of their representative clients confirmed the good quality of their work.

We find, therefore, in light of all the evidence, that there is no rational relationship between the union label requirement and the interest of the city in obtaining good quality work.

Defendants also contend that the union label requirement enables them to police effectively the city's policy that employees receive prevailing rates of wages. We think that justification is attenuated to the point of irrelevancy, but, in any event, it fails on other grounds.

The union label requirement was established by executive order in 1934 "to lend the greatest measure of aid and assistance during the present economic depression" to printing employees.[34] That order also contained provisions establishing the policy that prevailing wages should be paid to printing employees and providing that if any question were raised as to the wage rates of the lowest bidder, the N.R.A. Compliance Board would be requested to submit a report on the bidder's compliance "with the code requirements." We doubt that the union label requirement could rationally have been intended to ensure that the prevailing wage rate is paid to printers' employees because that requirement was unnecessary in light of these other provisions.[35]

Even assuming that the purpose was to ensure that the prevailing wage rate is paid, the evidence here refutes defendants' contention that the challenged classification rationally furthers that purpose. We will assume, *arguendo,* that Section 220 of the New York State Labor Law sets the prevailing wage rate, as defendants contend.[36] That statute defines "the prevailing rate of wages" as that rate paid to the majority of workmen, laborers or mechanics in the same trade. It does not mention labor unions.

The only testimony before us concerning the employment status of the "majority of workmen, laborers or mechanics" in the printing trade is that there are 350 non-union, as compared to 250 union, shops in a trade association known as Printing Industries of Metropolitan New York. This evidence indicates that the prevailing wage rate, as defined by the statute on which defendants rely, follows the non-union rate more closely than the union rate and, therefore, undermines defendants' contention that the union label requirement safeguards payment of the prevailing wage rate.

Moreover, plaintiffs' expert testified that there is no correlation between the union or non-union status of a printing company and the wage rates it pays to its employees; some non-union rates are as high or higher than some union rates. He further testified that union rates vary considerably.

Union rates, therefore, do not necessarily meet the prevailing wage rate. More fundamentally, there is no evidence here of any natural,[37] logical[38] or necessary correlation between the union wage rate and the prevailing wage rate. Nor is there any evidence showing any reason why non-union rates might not approximate the prevailing wage rate as closely as union rates. The presumption of validity must yield to the evidence which showed that there was no logical or even statistical correlation between the prevailing wage rate and the union or non-union status of the printing company. We, therefore, conclude that the challenged classification does not rationally further the city's interest in safeguarding the payment of prevailing wages.

The other arguments advanced by defendants in support of the union label requirement are equally unpersuasive. Their contention that the requirement facilitates policing of printers' claims for overtime wages because union rates are more easily ascertainable is refuted by the undisputed testimony of plaintiffs' expert that all overtime rates must be specified in every contract.

Defendants further argue that the city is benefited by the union label requirement because it results in better quality work due to the fact that the union operates schools which keep abreast of the latest technology. The relevant inquiry, however, is not whether the union conducts training programs but the comparative effectiveness of union versus non-union programs. Here, again, the only evidence before us is the undisputed testimony of plaintiffs' expert witness that the on-the-job training programs of non-union shops are at least as, and perhaps more, effective than training programs typically conducted outside the shop by the unions. Moreover, we have previously found that there is no correlation between the quality of work and the union or non-union status of the printing shop. Finally, the evidence refutes defendants' contention that the union label policy obviates the need for inspections of printing shops, and we reject it.

Accordingly, we find that defendants' policy and practice of restricting bidding upon, and of awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label violates the equal protection clause of the United States Constitution.[39]

The foregoing constitutes our findings of fact and conclusions of law, in accordance with Rule 52(a), Fed.R.Civ.P.

Settle an order within ten (10) days not inconsistent with this opinion.

Dated: New York, N. Y.
April 7, 1977

LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

FOOTNOTES

[1] 312 U.S. 496, 500-01 (1941).

[2] See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328 (1964); *Railroad Comm'n of Texas* v. *Pullman Co., supra*, 312 U.S. at 500-01.

[3] See C. Wright, Law of Federal Courts § 19, p. 63 (2d ed. 1970).

[4] See *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965).

[5] See *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

[6] See *Harman* v. *Forssenius, supra*, 380 U.S. at 534.

[7] *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 329; see *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 84 (1975); *California* v. *LaRue*, 409 U.S. 109, 124 n.2 (1972); cf. *Provident Trademens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 126 (1968).

[8] *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 329; see *Harman* v. *Forssenius, supra*, 380 U.S. at 534.

[9] Compare *Idlewild Bon-Voyage Liquor Corp.* v. *Epstein*, 212 F. Supp. 376, 382 (S.D.N.Y. 1962) (three-judge court), *aff'd sub nom. Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. 324, with *Railroad Comm'n of Texas* v. *Pullman Co., supra*, 312 U.S. 496, and *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 463 (1943).

[10] *Idlewild Bon-Voyage Liquor Corp.* v. *Epstein, supra*, 212 F. Supp. at 380; see *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185, 196-97 (1959); *Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77, 84 (1958).

[11] Union label requirements have been the subject of previous litigation in New York courts. An early case, *Davenport* v. *Walker*, enjoined the awarding of a contract on the basis of such a requirement, holding that the union label requirement was unconstitutional and clearly against public policy. *Davenport* v. *Walker*, 57 A.D. 221, 68 N.Y.S. 161, 164 (1901). See also *People ex rel. John Single Paper Co.* v. *Edgcomb*, 112 A.D. 604, 98 N.Y.S. 965, 966 (1906).

However, two subsequent cases approved the requirement at issue in this case. *Burland Printing Co.* v. *LaGuardia*, 9 N.Y.S.2d 616, 618 (Sup. Ct. 1938); *Amalithone Realty Co.* v. *City of New York*, 162 Misc. 715, 295 N.Y.S. 423, 425, *aff'd*, 297 N.Y.S. 262

(1937). Recent New York decisions have cast doubt upon the present validity of the union label requirement and the continued vitality of the *Amalithone* and *Burland* cases. See *Apex Indus. Const. Corp.* v. *Village of Lake George*, 31 A.D.2d 670, 295 N.Y.S. 2d 548, 549 (1968); *Long Island Signal Corp.* v. *County of Nassau*, 51 Misc.2d 320, 273 N.Y.S.2d 188, 194 (1966).

[12] See *Master Printers Ass'n* v. *Board of Trustees of Junior College Dist. 508*, 356 F. Supp. 1355, 1357 (N.D. Ill. 1973); see also *Anthony P. Miller, Inc.* v. *Wilmington Housing Authority*, 165 F. Supp. 275, 279-80 (D. Del. 1958); Abstention in Constitutional Cases, 122 U. Pa. L. Rev. 1071, 1100 (1974).

[13] See plaintiffs' Exhibit 1, Supplement to Standard Instructions to Bidders for Use in Printing Only, Form 23-L-46. Policy established in 1934.

[14] See plaintiffs' Exhibit 3, Standard Form of Contract Proposal, Form C.E. 8 (Part 1). Policy established in 1939.

[15] See plaintiffs' Exhibit 5, Memo dated December 3, 1971, from Mr. Brady, Assistant Sr. Vice-President, Finance, and Mr. Katz, Director, Procurement. Policy established 1971.

[16] 191 U.S. 207 (1903).

[17] *Id.* at 224.

[18] 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court), *aff'd without opinion*, 409 U.S. 904 (1972).

[19] *Id.* at 721-23.

[20] *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684, 687 (2d Cir. 1968).

[21] See *Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564, 571-78 (1972); See also *Thompson* v. *Gallagher*, 489 F.2d 443, 446-47 (5th Cir. 1973).

[22] See *Massachusetts Board of Retirement* v. *Murgia*, 44 U.S. L.W. 5077 (U.S. June 26, 1976); cf. *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952). See also *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947); *Thompson* v. *Gallagher*, *supra*, 489 F.2d at 446-47; *Burt* v. *City of New York*, 156 F.2d 791, 792 (2d Cir. 1946); *Mando* v. *Beame*, 398 F. Supp. 569, 572 (S.D.N.Y. 1975).

[23] See *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); 87 Harv. L. Rev. 1842, 1844-45 (1974).

[24] See *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970).

[25] See *Thompson* v. *Gallagher*, *supra*, 489 F.2d at 446.

[26] See *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 571-72.

[27] See *Bolling* v. *Sharpe*, *supra*, 374 U.S. at 499.

[28] See *Atkin* v. *Kansas*, *supra*, 191 U.S. at 224.

[29] 44 U.S.L.W. 5077 (U.S. May 26, 1976); see *Thompson* v. *Gallagher*, *supra*, 489 F.2d at 446-47; *Mando* v. *Beame*, *supra*, 398 F. Supp. at 572.

[30] See *Id.* at 5079; *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973).

[31] See *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 44 U.S.L.W. at 5079; *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 40-41; *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

[32] See *Massachusetts Board of Retirement* v *Murgia*, *supra*, 44 U.S.L.W. at 5079; *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 40-41.

[33] See *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 44 U.S.L.W. at 5078.

[34] See plaintiffs' Exhibit 2, Extract from Minutes of Meeting of Board of City Record, held April 12, 1934.

[35] See *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 536-37 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 452 (1972). See also Fair Labor Standards Act. 29 U.S.C. § 206; N.Y. Labor Law §§ 220, 652; Administrative Code of City of New York § 343-9.0 (a)(1)(f).

[36] But see 3 Op. State Compt. 293 (1947); 1943 Op. Atty. Gen. 110, 111. There is nothing in the order establishing the prevailing wage rate policy to determine how that rate is to be determined other than the oblique and tangential reference to "code requirements," presumably a "code of fair competition" promulgated pursuant to the National Industrial Recovery Act, which was declared unconstitutional in 1935. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

[37] See *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 44 U.S.L.W. 5077, where the Supreme Court concluded that mandatory retirement at age 50 for uniformed policemen rationally

furthered the state's purpose of protecting the public by assuring the physical preparedness of its uniformed police because fitness for uniformed work generally and naturally diminishes with age.

[38] See *Hughes* v. *Alexandria Scrap Corp.*, 96 S.Ct. 2488 (1976), where the Supreme Court upheld a Maryland statute whose purpose was to rid Maryland of auto hulks, requiring more extensive documentation from out-of-state than in-state unlicensed hulk suppliers. The Court found the Legislature could reasonably assume that a hulk destroyed by an out-of-state processor was more likely to have been abandoned outside the state and that the documentation requirement, by making it easier for an in-state than an out-of-state processor to receive bounties, tended to ensure that the state's limited resources were targeted to hulks abandoned inside Maryland.

[39] See *Master Printers Ass'n* v. *Board of Trustees of Junior College Dist. 508, supra*, 356 F. Supp. at 1357; *accord, State ex rel. United Dist. Heating, Inc.* v. *State Office Bldg. Comm'n*, 124 Ohio St. 413, 179 N.E. 138, 139 (1931), 125 Ohio St. 310, 181 N.E. 129 (1932); *Marshall & Bruce Co.* v. *Nashville*, 109 Tenn. 495, 71 S.W. 816-19 (1903). See also Annot., 110 A.L.R. 1406.

Order of MacMahon, J.

ORDER

This case having come on hearing upon Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief, and the Court having rendered its opinion on April 7, 1977, declaring that the practice of restricting bidding upon, and the awarding of printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label, was violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, therefore, it is

ORDERED, ADJUDGED and DECREED that:

(1) The Defendants' policy and practice of restricting bidding upon, and of awarding printing contracts to, only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label, is violative of the Equal Protection Clause of the United States Constitution;

(2) The Defendants are hereby enjoined from implementing and enforcing the aforesaid policy and practice of restricting bidding upon and awarding printing contracts to only those printing establishments whose employees are represented by labor organizations and who can, therefore, exhibit the union label.

(3) The order herein is stayed pending the disposition of the appeal of this Order to the Second Circuit Court of Appeals, on condition taken that the appeal be taken and prosecuted within the minimum time provided by the rules of that court without any extensions or adjournments.

Dated: April 20, 1977

LLOYD F. MACMAHON
U.S.D.J.

APPENDIX D

COPY

Extract from minutes of meeting of Board of City Record, held April 12, 1934. 11:15 A.M.

BOARD OF CITY RECORD
OFFICE OF THE SUPERVISOR

NEW YORK, April 12, 1934.

STEPHEN G. KELLEY,
Supervisor.

RESOLVED, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record;

1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.

2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment.

3. That wherever there may arise any doubt about the wages paid and labor conditions in the shop of the lowest bidder, on any contract or open market order issued by the Board of City Record, the N.R.A. Compliance Board be requested to submit a report on the bidder's compliance with the code requirements.

4. That on all requests for bids a statement be included that the City reserves the right to conduct an inspection of the work to be performed at the shop of the contractor during the process of manufacturing.

5. That the provisions of this resolution shall become effective on and after the 20th day of April 1934, and that the Supervisor of the City Record be, and he hereby is instructed to see that each and every one of these provisions are complied with.

ADOPTED, all members voting in the affirmative.

F. LaGuardia
Mayor

W. A. Cunningham
Comptroller

Paul Windels
Corporation Counsel

.....
Supervisor of the City Record.

Position	Original Respondents	New
Mayor	Abraham D. Beame	Edward I. Koch
Commissioner of Purchase of New York City	Robert Cohen	Gene Larkin
Comptroller	Harrision Goldin	Same
President, New York City Health & Hospital Corp.	John Holloman	Joseph T. Lynaugh
Members, Board of Directors, New York City Health and Hospital Corporation	June J. Christmas, M.D.	Same
	Frank Folk, M.D.	Same
	Vernal G. Cave, M.D.	Same
	Daniel J. Paulo, M.D.	Same
	Lowell E. Bellin, M.D.	Has terminated, was not replaced
	Paul Gibson	Has terminated, was not replaced
	James Dumpson	Blanche Bernstein
	Charles J. Bensley	Same
	Donald H. Elliot	Has terminated, was not replaced
	Milton F. Kirschman	Same
	William Michaelson	Same
	Elena Padilla	Same
Comptroller, New York City Health & Hospital Corp.	Robert J. Bradbury	Has terminated, not known if replaced
Director of Procurement, New York City Health and Hospital Corporation	Leonard Katz	Same

Position	Original Respondents	New
Chairman, New York City Board of Higher Education	Alfred A. Giardino	Harold M. Jacobs
Members, New York City Board of Education	Dr. Guerston Goldin,	Same
	Vincent R. Fitzpatrick	Loretta A. Conway
	Franklin H. Williams	Walter H. Crowley
	Mrs. Gustave Hauser	Armand D'Angelo
	Harold Jacobs	Same (now Chairman of the Board)
	Vinia R. Johnson-Quinones	Edith B. Everett
	Isiah E. Robinson, Jr.	Ronald T. Gault
		Albert V. Maniscalco
		Joan B. Maynard
		Emanuel R. Piore
		Joaquin Rivera
		David Z. Robinson
		Stuart Scheftel
		Patricia Carry Stewart
		David Valinski
		Edward A. Roberts
Director of Purchase New York City Board of Higher Education	Francis McGivney	Jeff Baicher
Comptroller, New York City Board of Higher Education	Abraham Rabinowitz	Arnold Riback
President, New York City Board of Education	Isiah E. Robinson, Jr.	Steven Aiello

Position	Original Respondents	New
Director of Purchasing, New York City Board of Education	Sol Berger	Same
Members, New York City Board of Education	Steven Aiello	Same
	Robert Christian	Same
	Dr. Amelia Ashe	Same
	Joseph G. Barkan	Same (now Vice President)
	Joseph Monserrat	Louis Rivera